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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 369-37

Frederick T. Zuber, *et al.*, *Petitioners*,

v.

Russell Allen, *et al.*, *Respondents*.

No. 1096 Misc.

Clarence M. Hamm, Secretary of Agriculture of the United States, *Petitioner*,

v.

Russell Allen, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICI CURIAE OF THE ATTORNEYS GENERAL OF MASSACHUSETTS, RHODE ISLAND AND CONNECTICUT

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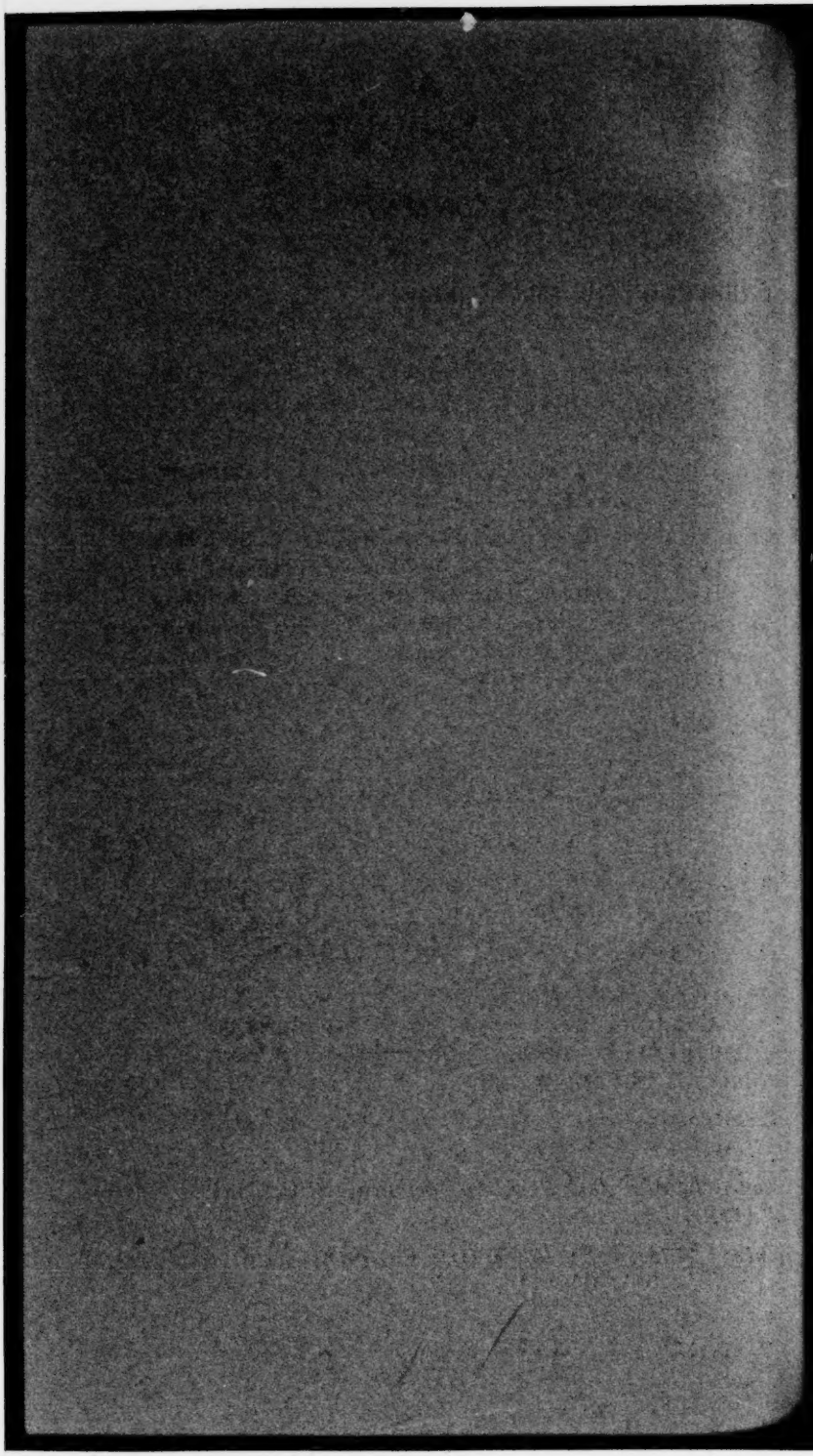

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, *et al.*, *Petitioners*,

v.

RUSSELL ALLEN, *et al.*, *Respondents*.

No. 1076

CLIFFORD M. HARDIN, Secretary of Agriculture of the United States, *Petitioner*,

v.

RUSSELL ALLEN, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICI CURIAE OF THE ATTORNEYS GENERAL OF MASSACHUSETTS, RHODE ISLAND AND CONNECTICUT

The Attorneys General of the Commonwealth of Massachusetts and the States of Rhode Island and Connecticut, pursuant to Rule 42 of the Rules of this Court, urge by this joint brief that this Court reverse the decision of the court below and uphold the legality of the nearby differential provision in issue in the present case. The jurisdictional requisites, the pertinent facts, the questions presented for review and the reasons why the differential provision should be upheld are set forth in the petitioners' briefs and are adopted herein. The opinions below and the relevant statu-

tory and regulatory provisions are printed in either the Appendix or in the briefs of the petitioners.

INTEREST OF THE AMICI CURIAE

The Attorneys General of the Commonwealth of Massachusetts and the States of Rhode Island and Connecticut have joined together in this brief *amici curiae* because a homogeneous duality of interests exists among their three states. First, all three states share a common interest in the economic health and well-being of their dairy farming populations. Virtually all dairy farmers in the three states are nearby producers whose livelihood and capital investments in dairy herds and facilities have been seriously jeopardized by the decision below. Secondly, the consumer populations of the three states are those who buy milk from handlers regulated under the Massachusetts-Rhode Island and Connecticut milk marketing orders.[1] The preservation of an adequate and reliable source of fluid milk supply to those consumers at reasonable prices is also of paramount concern.

The minimum price adjustment provision challenged in the present litigation provides for payment to more than three thousand dairy farmers whose farms are readily accessible to the large population centers of southern New England of somewhat higher prices than those required to be paid to dairy farmers located at greater distances from those centers. Consistent with economic data drawn from different periods, each preceding the institution of Federal regulation in various parts of southern New England over

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[1]The nearby differential provision of the Connecticut Milk Marketing Order was sustained in *Cranston v. Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968). Appeal of that case is now pending before the U.S. Court of Appeals for the Second Circuit, oral argument having been held before that court on June 12, 1969. (*Cranston, et al. v. Hardin and Guilian, et al.*, Nos. 32,793-796.)

the past three decades,[2] this pricing variation allocates a portion of the total proceeds paid by handlers for milk received by them from producers in approximate conformity with pricing patterns long customary in the affected supply areas.

The provision is vital from an economic standpoint in that it helps preserve in the market that core of producers which, for legitimate economic reasons, including greater evenness of production, the greater availability and reliability of their supply, alternative marketing opportunities, and accessibility to small dealers, provides a substantial contribution to the market over and above that associated with the milk of distant producers. These nearby producers received greater returns than their distant counterparts in each instance prior to the commencement of Federal regulation, and would receive a similarly higher price in its absence. The provision is as well cognizant of the equities inherent in the pre-regulation pricing relationships between generally higher cost "nearby" and generally lower cost "distant" producers. As the Court of Appeals below noted, the provision is "designed 'to reflect the fact that under competitive conditions' nearby producers got a higher price . . . ."[3]

The decision below eliminating this minimum price adjustment provision from the orders ignores customary pricing practices and equitable considerations. In doing so, it takes vast amounts of money from producers who have long depended upon them and pays them, as a windfall, to producers who have never expected to receive them, and who have long supported orders containing such provisions. The decision destroys altogether a pricing relationship which has been an accepted fact of life for all sectors of the dairy industry of New England for more than half a century. In

[2] 1933-37 in the Greater Boston market, 1949 in the Springfield and Worcester markets, 1958 in the southeastern markets and 1959 in the Connecticut market.

[3] *Zuber v. Allen*, 402 F.2d 660, 664 (D.C. Cir. 1968). Cf. *Blair v. Freeman*, 370 F.2d 229, 237 (D.C. Cir. 1966).

the process, by suddenly and drastically reducing the income of southern New England's producers, especially at a time of serious inflationary trends in the national economy, the decision threatens to eliminate a substantial portion and seriously harm all of Southern New England's dairy farming population.[4] Such a result, in the opinion of the Secretary's own experts, may in turn lead to "permanent injury to milk supply for consumers"[5] in the *amici's* states. The interest of the *amici curiae* is therefore apparent.

ARGUMENT

I.

THE COURT BELOW ERRED IN DISREGARDING THE EXPERTISE OF THE SECRETARY WITH RESPECT TO QUESTIONS OF THE UTMOST COMPLEXITY.

The institution and maintenance of a Federal milk order program in a marketing area such as the Massachusetts-Rhode Island area constitutes an undertaking of the utmost economic complexity. It attempts to provide a reasonable return for their milk to thousands of dairy farmers in far-reaching locales and diverse circumstances sufficient to guarantee an adequate supply of milk to millions of consumers of milk living in the regulated area.

The regulatory scheme entrusted to and administered by the Secretary operates in what is generally conceded to be an industry of "labyrinthean complexity".[6] Effective regu-

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[4]Besides the producers located in the *amici's* three states, the nearby producer population serving the southern New England marketing areas includes producers located in Maine, Vermont, New Hampshire and a large portion of southeastern New York State immediately adjacent to Connecticut's western boundary.

[5]See affidavit of Herbert Forest, Director, Dairy Division, Consumer and Marketing Services, U.S. Department of Agriculture, filed with the District Court on January 9, 1967. (R. 52).

[6]*Blair v. Freeman*, *supra*, at 239 (D.C. Cir. 1966).

lation of the industry requires a corresponding intricacy of administrative consideration. In promulgating regional marketing orders, the Secretary must concern himself with a host of factors, including the requirements of large groups of consumers, handlers and producers, interrelationships with other neighboring orders, the larger economy of the regulated region, and considerations of national economic policy. His informed judgment cannot, however, be limited to such broad public considerations, for he must as well, if his regulation is to be effective, take into account the narrow but important concerns of the individual producer and his relationship to the individual handler and individual consumer.

The difficult problems with which the Secretary must grapple in evolving effective regulation of a given milk market are treated in a report made to him in 1962, at his request, by a group of economists representing the private sector.[7] The utter lack of simple solutions in this field is dramatically evidenced by the fact that this report is literally filled with dispute on a vast number of fundamental issues.[8] The chairman of the committee could only, in submitting the report, refer to the adage "doctors disagree" and point out that the report reflects "divergent economic and social philosophies." No less than one-half of the committee filed a dissenting opinion to a substantial portion of the report.[9]

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[7]*Report to the Secretary of Agriculture by the Federal Milk Order Study Committee*, dated December 1962 (also known as the Nourse Committee Report).

[8]Members of the committee, among other things, evinced concern regarding nearby differential adjustments and suggested that they be the subject of further study to determine whether or not they should be reduced or eliminated, principally in those markets having a higher fluid milk utilization. A contrary view stressed the continuing importance of the differential to market stability. No member of the committee questioned the Secretary's power to provide for the differential. (See *Report*, pp. 74-76, 82-86, 97 and 102-05.)

[9]See *Report*, pp. 102-05.

The court below, while paying lip service to the difficult nature of the Secretary's duties under the statute, appears not to have given due recognition to the fact that the Secretary is the expert with respect to milk regulation and that, accordingly, courts should be hesitant to upset the delicate economic relationships worked out in his milk orders without the most compelling of reasons. Even then, it would seem that a court should at least reserve to the Secretary the opportunity to repair or to minimize the individual and public harm and inequities attendant upon the court's regulatory alterations so that they may be tempered by application of administrative expertise and sensitivity. Cf. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, at 618-20 (1944).

The lower court has failed altogether to heed the foregoing considerations. Instead, it has taken upon itself the role of both legislator for the Congress, in reading into the Act an intent contrary to its other provisions and its history, and administrator to the fluid milk markets, in peremptorily eliminating, without dialogue with the Secretary or adequate provision for the relevant economic considerations, a key provision of thirty years standing which was fully supported in the evidentiary record and was peculiarly within the competence of the Secretary.

In acting both as legislator and administrator, the court below has haphazardly undertaken first to immerse itself in a mass of factual detail by way of surmises, guesses and assumptions[10] and then to interpret the meaning of this detail in ways contrary to judgments of economic experts representing both the industry and the Secretary, contrary to true historical perspective and contrary to the rulings of three other courts, including this court.[11] Such an adventure

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[10] E.g., 402 F.2d at 665 ("This surmise"), 670 ("it does not appear"), 673 (n. 36, "It is probably safe to guess. . .").

[11] *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, at 567 (1939); *Green Valley Creamery, Inc. v. United States*, 108 F.2d 342, at 346 (1st Cir. 1939); and *Cranston v. Freeman, supra.*

into the intricacies of a complex regulatory field is fraught with peril from the standpoint of both sound administrative practice and the larger public interest.

II.

THE DECISION BELOW THREATENS SERIOUS HARM TO THE DAIRY ECONOMY OF SOUTHERN NEW ENGLAND.

The decision below not only constitutes a prospective crushing blow to the dairy farmers of the *amici* states, but, as importantly, threatens the orderly market carefully nurtured and maintained by the Secretary to assure adequate supply and reasonable prices to the consumers in these states.

The Massachusetts-Rhode Island Order and its predecessor orders, which have included from their 1936 inception in the Greater Boston market a nearby differential, have worked in practice for over three decades in successfully maintaining "orderly marketing conditions" and an adequate supply and reasonable prices to farmers, the declared statutory objectives. (See § 2 of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 602.) It has preserved, for the benefit of the entire milk market and milk consumers, a nearby source of supply with the attributes of evenness of production, accessibility and reliability, while at the same time affording favorable opportunities for more distant producers to enter the market with ever increasing supplies at an attractive price level. (R. 322-24; 330; 351-52; 515; 521; 615-18 and 625).

Currently nearly 2,500 "nearby" milk producers living in the *amici's* three southern New England states sell their milk to handlers serving the Massachusetts-Rhode Island and Connecticut Milk Marketing Areas. These dairy farmers received approximately one hundred million dollars for milk sold by them in the past year. They consequently occupy a leading place in the southern New England agricultural

economy and a substantial position as well in the larger economy of the region.

For more than three decades Massachusetts dairy farmers have made substantial investment[12] and management decisions predicated upon a form of Federal regulation in which market wide pooling was coupled with a nearby farm location differential provision identical to the one at issue in the present case. Long before the institution of Federal regulation in the Greater Boston market in 1933, nearby producers received prices substantially higher than those received by producers located in northern New England distant from the major markets of the *amici's* states. From its beginnings in the Greater Boston market in 1933, Federal regulation has recognized the continuing viability of the price variation represented by the differential in the Massachusetts markets.

A similar pricing pattern prevailed with respect to producers serving handlers selling milk in both the Connecticut and southeastern New England markets prior to the institution of Federal regulation in those markets in the late 1950's, and its continuing viability has been recognized by the Secretary through nearby differential provisions con-

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[12]The general scarcity of farm labor and its high cost, when obtainable, coupled with the volume economics of present day dairying have compelled farm automation and establishment of larger herds. The investment required to modernize a dairying farm, including increasing a herd from 30 to 50 cows, costs approximately $52,900, including $35,400 for buildings, $9,000 for 20 cows, $4,900 for milking equipment, and $3,600 for a bulk tank. For a 100 cow operation the capital investment would range from $50,000 to $150,000, depending upon the previous size of the farm prior to mechanization for an efficient large scale dairying enterprise. In the nine-year period 1955-1964, it is estimated that, at a minimum, $8 million has been invested by nearby producers in new facilities, based on a price including a nearby differential. The loss of the differential may make even these modernized nearby operations uneconomic and force many nearby farmers out of business with a loss of much of the capital invested in these dairying facilities.

tained in his orders affecting those areas. As a result, nearby producers serving those areas have as well entered into extensive obligations and made decisions upon the assumption that the Secretary's regulation was valid.

The present case has resulted in the escrowing of some $250,000 per month and in a fund which now totals over $7 million.[13] These monies would otherwise accrue to southern New England milk producers, a substantial majority of which are located in the *amici's* states. This withholding of funds has already had serious adverse effects on the southern New England dairy economy, and, if it is made permanent by a decision adverse to the nearby producers in the present case, will only accelerate the currently increasing trend of producers leaving the market.

The decline in numbers of producers throughout the northeastern portion of the country in recent years has prompted the Secretary to institute substantial Class I price increases in the northeastern markets in an emergency fashion. In a recent administrative decision raising the Class I price in six northeastern markets by $.24 per hundredweight, the Secretary in part explained his action in the following terms:

> "Producers continue to drop out of production in the northeast Federal order markets at a rapid rate . . . there was a loss of about 6% in producer numbers in the last year. . . . This continued trend poses a very serious threat to the adequacy of a milk supply for consumers in the northeast. . . . The continuing rise in production costs, the tight labor market and the alternative employment opportunities available to dairy farmers in the northeast pose a serious threat to continuing adequacy of milk supplies in the region." 33 Fed. Reg. 12849-12850 (1968).

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[13] In *Cranston, et al. v. Hardin and Guilian, et al., supra*, in which the validity of the Connecticut nearby differential has been upheld, the escrowed differential amounts currently total over $600,000, with additional amounts accruing at a monthly rate of approximately $25,000.

This trend is particularly striking in the southern New England states affected by the escrowing of nearby differential funds. Massachusetts experienced a decline of 17 percent in its numbers of dairy farmers, losing some 296 producers, in the two year period following creation of the escrow fund. Connecticut's total producer numbers have shrunk from a 1955 total of 3,689 to the current level of less than 1,300.[14] The latter state's average monthly losses for the year ending October 1968 numbered between 7 and 8 producers.[15]

This is in sharp contrast to the fact that the total number of distant producers whose milk is marketed under the Massachusetts-Rhode Island Order increased from 6,413 in October 1966 to 6,578 in October 1968. A decision by this Court that the nearby differential provisions should be eliminated can only accelerate these tendencies, with potentially harmful ramifications for the dairy farmers in the nearby areas in the region formed by the *amici's* states.

The social and economic implications inherent in the departure of producers from dairying, on both a regional and individual scale, was suggested in testimony given by Connecticut Commissioner of Agriculture and Natural Resources, Joseph N. Gill, in 1963 at Federal hearings concerning Class I pricing in the Connecticut market:

> "Think of the bulk tanks for sale, the land lying idle or going into new uses, the people finding new jobs and a new way of life, the changes in tax base for our towns, the cows for sale, the machinery and buildings no longer needed, the effect on suppliers of feed and other inputs, and many other factors (which come into play when producers leave dairy farming) . . . ."[16]

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[14] *Milk Price Handbook for Connecticut* (published September 1968, by Cooperative Extension Service of the College of Agriculture, University of Connecticut), p. 22.

[15] *Connecticut Dairy Facts*, November 1967 - November 1968.

[16] Statement at Hearing on Proposed Amendments to Connecticut and Other Northeastern Federal Milk Orders, beginning May 6, 1963, at Market Administrator's Office, 205 East 42nd Street, New York 17, N.Y.

Beyond the cost increases to the ultimate consumers in the *amici's* heavily populated urban centers which would necessarily follow from the development of inefficient or disorderly marketing patterns, it is to be noted that those knowledgeable in the economics of milk regulation have repeatedly testified in pertinent administrative proceedings that the elimination of the differential would cause a shift of supplies between markets and depress farmer prices. The price drop could in turn bring strong pressure for increments in the Class I price, raising consumer prices. (R. 365-68, 377-79, 494, 505, 515-16, 518 and 556). Dr. Stewart Johnson, Professor of Agricultural Economics of the University of Connecticut, with extensive expertise in milk marketing, stated in this proceeding[17] that the elimination of the nearby differential would result in "shifts of additional New York producers to Massachusetts-Rhode Island order" and a blend price drop. He stated that lower income to southern New England farmers could bring pressure "for relief by higher Class I prices, and consequent higher retail prices to consumers."

That there is a connection between certain of the economic trends occurring in the New England area referred to previously and the concerns expressed by these expert evaluations has been determined by the Secretary. See 33 Fed. Reg. 9502-03 (1968).

Herbert L. Forest, Director, Dairy Division, United States Department of Agriculture, stated, in an affidavit filed January 9, 1967, at the commencement of this case in the District Court, that elimination of the price adjustment at issue in the present case would "bring about chaotic conditions in the market" and "so misalign the existing (milk) price structure, injure producers, and so seriously disturb long-standing marketing relationships that permanent injury to milk supplies for consumers in the region would result."

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[17]Affidavit filed by Petitioners Zuber, et al. with the District Court on September 5, 1967, in connection with their motion to continue the escrow (part of the original record filed with this Court).

(R. 52). This view of an expert charged with supervision of the Federal milk order programs on a national level only serves to underscore the importance of this case to the *amici's* states, which constitute both the situs of the consumers receiving milk affected by the price regulation at issue, and those substantial sectors of the supply areas serving the markets of southern New England which are coincident with the marketing areas involved.

III.

THE WORDS "IRRESPECTIVE OF THE USES MADE OF SUCH MILK BY THE INDIVIDUAL HANDLER TO WHOM IT IS DELIVERED" SET FORTH IN THE AGRICULTURAL MARKETING AGREEMENT ACT WERE INTENDED BY CONGRESS TO ENABLE THE SECRETARY TO REGULATE INDIVIDUAL HANDLERS UNDER MARKETWIDE POOLING PLANS.

At the core of the decision below is its insertion into the Act, by a construction of narrow focus, of a requirement for rigid uniformity of price among farmers without full regard to individual equities. The strained interpretation of the court below, coming after 30 years of contrary construction by the Secretary, knowledgeable experts and three other courts, and outlawing any reliance by the Secretary upon the prohibited factor of fluid use patterns, warrants close attention.

The Court of Appeals for the District of Columbia, in the cases of *Blair v. Freeman* and *Zuber v. Allen*, has held that the clause "irrespective of the uses made of such milk by the individual handler to whom it is delivered" contained in § 608c(5)(B)(ii) of the Act rigorously "forbids" the Secretary from in any way considering, in promulgating adjustments to uniform prices payable to producers, ". . . the use to which the milk of a particular producer or class of producers is put, historically or potentially . . . ." In fact, however, this clause is designed to enable the Secretary, in deter-

mining prices payable to producers under a marketwide pooling plan, to disregard individual handlers' fluid utilization levels. The clause consequently performs a far different task from that assigned it by the court below.

The term "irrespective of the uses made of such milk by the individual handler to whom it is delivered" set forth in subsection 608c(5)(B)(ii) serves to emphasize the contrast between the individual handler pooling authority granted under subsection 608c(5)(B)(i) and the marketwide pooling authority granted under subsection 608c(5)(B)(ii). This descriptive role becomes apparent when it is considered that while, on the one hand, individual handler pooling operates to provide each group of producers supplying each individual handler with uniform minimum prices different from other groups of producers supplying other handlers because of the differing shares of the fluid use market obtained by the various handlers in the market, marketwide pooling, on the other hand, operates to provide uniform minimum prices to all producers "irrespective" of the use classes in which the individual handlers' milk is sold. It further explains why the phrase appears in the subsection authorizing marketwide pooling and does not appear in the subsection authorizing individual handler pooling.

Moreover, and more importantly, in addition to clarifying the difference between individual handler and marketwide pooling, the phrase in issue explicitly lodges positive authority in the Secretary, in instituting marketwide pooling in regulated markets, to ignore those individual handler fluid utilization levels which in regulated individual handler pools and as well generally in unregulated markets are largely determinative of prices paid producers. When considered in the light of the concepts of the limits of governmental regulatory power of the day, it can be seen that the positive authority so granted was of an extremely controversial nature. It expressly permitted the Secretary to provide, in marketwide pooling plans promulgated by him, for the transfer of proceeds obtained in the marketplace

from one handler's sale of milk to the benefit of producers who had never supplied that handler, whose milk may have been sold at an entirely different place and to different customers and who had supplied another handler. In doing so, it enabled the Secretary to deprive high fluid use handlers[18] of a significant competitive advantage they possessed over their lower fluid use competitors in obtaining milk supplies.

It is most anomalous that, at this late date in history, a provision intended to authorize the Secretary to limit the

[18]At the time of the enactment of the legislation there were, and still are, different types of handlers. One example is the small proprietary handler whose business consists principally, if not entirely of a local milk route in a given community. Almost 100% of the sales by this kind of handler are fluid use sales. Similarly, producers selling their milk directly to consumers in the marketing area, known as "producer-handlers," generally market most of their product in fluid form. (The "producer-handlers" are generally exempted from the pooling provisions of the Secretary's orders.) Another type is the large handler serving fluid route sales in a number of communities, both wholesale and retail, and engaged in the manufacture of ice cream, butter and other dairy products throughout the entire area. These large handlers traditionally have had a substantial amount of fluid use sales, but also use a substantial portion of surplus milk for non-fluid sales. A fourth type is the handler whose business consists principally of the manufacture and sale of milk products, such as cheese, butter, ice cream and the like. Virtually none of this fourth type is found in the nearby area. This fourth type of handler at the time of the Act had, and even today has, almost no fluid milk sales. Since the institution of milk orders most, if not all, manufactured milk handlers in the Northeast have made a minimum amount of fluid sales for a minimum portion of the year sufficient to qualify themselves for regulation under federal orders so that their producers will be entitled to share in blend prices. A much larger proportion of the milk produced in distant areas under the Massachusetts-Rhode Island Order goes to this latter type of handler than is the case with milk produced in nearby areas. (It should be noted, parenthetically, that, since characteristics such as evenness of production, accessibility and reliability are only important to the handler primarily selling milk in fluid use, distant producers selling to these manufactured milk handlers are not required through the year to provide as important value contribution as their nearby counterparts, who primarily serve fluid milk handlers.)

potentially disruptive effects of varying handler utilization levels in milk markets should be read now to have precluded a differential adjustment which is not now and never was disruptive in its effects, which does not depend on the individual handler's use of the milk delivered to him, which is economically legitimate and equitable as among producers serving the market, and which preserves one of those market variations the preservation of which the *Rock Royal* court[19] felt was central to the constitutionality of the Act.

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[19]See *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, at 567, 571-73 (1939).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petitioners' briefs, the decisions of the courts below should be reversed and the relief sought by the petitioners should be granted.

Respectfully submitted,

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